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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1312

MARY ANN TURNER,

Petitioner,

v.

DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH

Respondents.

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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The respondents, Department of Employment Security and Board of Review of the Industrial Commission of Utah respectfully urge that a writ of certiorari should not issue to review the Judgment of the Supreme Court of the State of Utah entered on February 4, 1975.

QUESTION PRESENTED

Respondents consider the question presented to be whether the limitation of Utah Code Annotated § 35-

4-5(h) (1) against extending unemployment insurance benefits to individuals in near-term pregnancy and immediately thereafter is sustainable State action under the equal protection requirement of the fourteenth amendment to the United States Constitution. The statute in question neither expresses nor requires any presumption about the fitness of pregnant individuals for work as asserted in the petition.

STATUTORY PROVISION INVOLVED

The part of Utah Code Annotated § 35-4-5(h) which was applied to the petitioner and is therefore pertinent hereto, provides:

> An individual shall be ineligible for benefits . . .
> (h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the 6 calendar weeks after the date of such childbirth;

STATEMENT OF THE CASE

The statement of facts in the case by the parties before the Supreme Court of Utah is as follows:

1. The appellant duly filed a proper claim for unemployment benefits, had sufficient base period wage credits and was otherwise eligible, except for pregnancy disqualification at issue in the case.

2. The appellant was separated involuntarily from her work on November 3, 1972 for reasons unrelated to pregnancy. She was pregnant at the time, however, and expected date of the birth of her child was established by her doctor as June 6, 1973. In application of Section 35-4-5 (h), Utah Code Annotated, 1953, she was disqualified by the Department of Employment Security on March 22, 1973, from receiving unemployment benefits for a period beginning March 11, 1973, twelve weeks preceding the expected date of childbirth, and continuing for six calendar weeks after the date of childbirth. The disqualification was affirmed by the Appeals Referee on April 19, 1973, and by the Utah Board of Review on June 25, 1973.

3. After filing her claim for unemployment benefits the appellant worked intermittently on call as a clerical worker for a manpower service.

Upon a direct, timely appeal by the petitioner in which the federal question was raised, the Utah Supreme Court held the limitation of Utah Code Annotated § 35-4-5(h) (1) against extension of insurance benefits to pregnant individuals in the described time period to be a proper exercise of legislative authority under the equal protection provisions (Article I, Section 2) and equality of rights provisions (Article IV, Section 1) of the Constitution of Utah. Beyond the state constitutional aspect of the case the court did not refer to the federal question, but affirmed the decisions below upon the conclusion that the limitation upon benefits ". . . violates no constitutional requirement."

No petition for rehearing was filed although such was permissible under Utah Rules of Civil Procedure, Rule 76(e) and (f) within 20 days after the filing of the decision of the Supreme Court, or thereafter on approval of any justice upon good cause shown.

REASONS FOR DENYING THE WRIT

I. THE RESULT BELOW DEALS WITH A QUESTION ALREADY DETERMINED BY THIS COURT IN *GEDULDIG v. AIELLO*, 417 U.S. 484 (1974), AND EARLIER RELATED CASES, AND IS WHOLLY IN ACCORD WITH THOSE DECISIONS. LIKE THAT IN *GEDULDIG*, THE STATUTORY CLASSIFICATION IN THIS CASE IS A LEGISLATIVE DETERMINATION AS TO THE EXTENT OF COVERAGE FOR BENEFITS OF A STATE SOCIAL WELFARE SYSTEM; ITS INSURANCE PRINCIPLES REQUIRE A BALANCING OF BENEFIT COSTS AGAINST REVENUES; THE BASIS OF THE COVERAGE LIMITATION IS OBJECTIVELY DEFINABLE; AND NO PRESUMPTION ABOUT PREGNANCY AND FITNESS FOR WORK IS MADE NOR REQUIRED.

The classification upheld by this Court in the *Geduldig* case was a provision of the California unemployment compensation disability insurance law which denies benefits to women for disability incident to normal pregnancy and childbirth whereas it allows benefits to women and men for virtually all other disabilities.[1]

That law and the Utah provision involved here have close similarities in light of the elements noted by this Court material to its decision. Basic among these is that each was established, as this Court said in *Geduldig*, ". . . as an insurance program that was to function essentially in accordance with insurance concepts." 417 U.S. 484, 492. Each is self supporting upon the balancing of revenues and benefit costs built into the system. In neither case can the legislative limitation on benefits coverage be broadened without increasing the rates required to support the system.

With regard to coverage of its unemployment insurance benefits, Utah has done precisely as California did, in the description of this Court, about disability insurance benefits:

> Although California has created a program to insure most risks . . . it has not chosen to insure all such risks . . . This Court has held that, conisstently with the Equal Protection Clause, a State ". . . may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of a field and

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[1] §2626 California Unemployment Insurance Code provides: " 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of mental or physical condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

apply a remedy there, neglecting the others . . ." 417 U.S. 484, 494-495. (Citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and *Jefferson v. Hackney*, 406 U.S. 535 (1972).

The California program before this Court in *Geduldig* and the Utah program in this case are both social welfare programs, distinguished in Equal Protection doctrines from other statutory classification problems. As the Court said in *Geduldig*:

> *Particularly with respect to social Welfare programs*, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." 417 U.S. 484, 495. Citing *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970) (emphasis supplied).

In its unemployment insurance social welfare program, the State of Utah has a no less legitimate interest than does California as to its unemployment insurance disability program. Regarding the latter, the Court pointed out in *Geduldig* the legitimate interest of California in maintaining the self-supporting nature of its program, in using resources so as to maintain an adequate benefit level, and maintaining contribution rates at a level not unduly burdensome. 417 U.S. 484, 496.

The foregoing application of the *Geduldig* case rationale to the present case demonstrates the close analogy between the two situations and the State interest in the coverage limitation in each instance.

Finally, it should be noted that in each act the basis of ineligibility is objectively definable. This Court also observed in the*Geduldig* case that normal pregnancy is an objectively definable physical condition and that, lawmakers are constitutionally free to include or exclude pregnancy from coverage of legislation such as this on any reasonable basis.

II. SINCE *GEDULDIG V. AIELLO* THERE HAS BEEN A UNIFICATION OF AUTHORITY AMONG LOWER COURTS ABOUT THE APPLICATION OF CONSTITUTIONAL PRINCIPLES TO GENDER-RELATED CLASSIFICATIONS.

After some earlier uncertainty as to the standard for judicial scrutiny to be applied in cases of statutory classifications involving pregnancy, the *Geduldig* case has brought obvious clarification. The case of *Hanson v. Hutt*, 83 Wash. 2d 195, 517 P. 2d 599 (1974), and the lower Federal court cases and early opinions of State Attorney's General, etc., cited by the petitioner would, no doubt, be decided and written differently since the *Geduldig* case.

In the *Hanson* case the Washington State Court relied heavily upon *Frontiero v. Richardson*, 411 U.S. 677 (1973) to decline application of the traditional standard of review and to apply a rigorous scrutiny adverse to the State unemployment insurance pregnancy limitation on the grounds that (1) a pregnancy classification is per se discrimination against women on the basis of sex, and (2) sex discrimination is an inherently

suspect classification. This despite the fact that *Frontiero* involved neither a pregnancy classification nor a social welfare program issue. The principles of the *Geduldig* case, involving both of these, would obviously be more applicable than was *Frontiero*.

An indication of the unsettled state of doctrine prior to *Geduldig* is in the opinions of Attorney's General cited in the petition.[2] The virtually verbatim opinions released in Michigan and Oklahoma in 1972 dwelt largely upon statutory discountenance of sex discriminations. Each made the erroneous assumption that a statutory pregnancy classification is per se a sex discrimination and is, therefore, of presumed unconstitutionality.

The Pennsylvania Attorney's opinion dealt with the statutory constraints upon the pregnancy provision and did not reach the constitutional question.

By contrast with these earlier declarations, the several pertinent decissions of lower Federal courts subsequent to the *Geduldig* decision and applying that decision show impressive consistency in dealing with constitutional issues involving pregnancy or gender in statutory classifications. Thus, *Crawford v. Cushman*, 378 F. Supp. 717 (D. Vermont, 1974) upheld, under Equal Protection challenge, the Marine Corps requirement for

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[2] Michigan: Attorney General's Opinion dated Feb. 18, 1972, CCH Empl. Prac. Guide 5501; Oklahoma; Attorney General's Opinion No. 72-211, Nov. 22, 1972, 8 CCH Unempl. Ins. Rep. (Okla.) 8144; Pennsylvania: Attorney General's Opinion No. 9, Feb. 7, 1974, CCH Empl. Prac. Guide 5220.

discharge in event of pregnancy, noting that the statute does not operate against women as a class but reaches only those who become pregnant. *Kohr v. Weinberger*, 378 F. Supp. 1299 (E.D. Pa., 1974) upheld the Social Security allowance of benefit computation upon three years less requirement for women than for men. The court, applying the rational basis test, observed that the *Geduldig* case and *Kahn v. Shevin*, 416 U.S. 351 (1974), following *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), ". . . make it clear that the Supreme Court has not followed the close judicial scrutiny test in fifth and fourteenth amendment cases dealing with alleged discriminations based on gender." 378 F. Supp. 1299, 1303. In *Bond v. Virginia Polytechnic*, 381 F. Supp. 1023 (W.D. Va. 1974) the court upheld, as to Equal Protection requirements, limitations upon a state university student health plan which provided numerous other free services but did not provide pap tests or gynecological examinations. Citing *Geduldig*, the court noted the State interest in maintaining the self-supporting nature of the program and reiterated its understanding that "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." 381 F. Supp. 1023, 1024. In *Communications Workers of America v. American Telephone and Telegraph Co.*, 379 F. Supp. 679 (S.D. N.Y. 1974) the court cited *Geduldig* to the effect that distinctions involving pregnancy do not per se constitute discriminations on the basis of sex or gender, and dismissed (with leave to re-file) complaints defective in their reliance upon the former presumption character-

izing pregnancy classifications conclusively as sex discriminations.

In two other instructive recent decisions, Federal courts noted that while under the clarified equal protection requirements, per *Geduldig*, there need only be a reasonable basis for State application of a pregnancy classification, such a limitation in the fourteenth amendment does not impede the enforcement of more stringent implementing statutory requirements as these may be enacted by Congress. *Vineyard v. Hollister Elementary School District No. 6*, 64 FRD 580 (N.D. Cal. 1974) invalidated the school district maternity leave requirements as contrary to Title VII of the Civil Rights Act of 1964. *Satty v. Nashville Gas Co.*, 384 F. Supp. 765 (M.D. Tenn. 1974) struck down the company maternity leave policy under the same act, referring to the enacting power of Congress under the Commerce Clause.

III. THE QUESTION PRESENTED IN THIS CASE IS READILY DISTINGUISHABLE FROM THAT INVOLVED IN *CLEVELAND BOARD OF EDUCATION v. LeFLUER*.[3]

The petition emphasizes the failure of the Utah Court to rely upon or acknowledge the *Cleveland* case in dealing with the pregnancy classification at issue. The petition does not cite or explain *Geduldig v. Aiello*, although the Utah Court opinion cited that case and the case was central to the position of the defendant before that court. It should be noted, too, that the plaintiffs

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[3] 414 U.S. 632 (1974).

before the Utah Court did not cite the *Cleveland* case although it was earlier than *Geduldig*. Neither was the *Cleveland* case cited in the opinions given by this Court in *Geduldig*.

As has been shown, there is a close analogy between the circumstances and the basis of the statutory scheme in *Geduldig* and the present case. By contrast, there is a fundamental dissimilarity between the basis of this case and that of *Cleveland v. LeFluer*.

The latter turned upon a requirement for summary termination of teachers in on-going employment, without recourse, solely because of their pregnancy. This Court quite necessarily invalidated the mandatory separation scheme because it *did* require as an intrinsic part of its logic the application of an irrebuttable presumption against the employability of such teachers because of their pregnancy.

The Utah law makes no such presumption and it does not require any such rationale as the basis for its operation. Rather, it is explainable as a rational expression of State policy on entirely different grounds.

The *Cleveland* case involved employment rights and interests as weighed against the employer's concern for the teachers' physical ability to perform and for the assured continuity of classroom instruction. The present case balances a demand for social welfare benefits beyond the legislative coverage provided, against the State interest in limiting coverage of the system and thereby maintaining solvency through a parity of revenues and

benefit costs. The State policy implicit in the limitation of coverage rests for its rationale, not upon the employability or lack thereof of pregnant individuals, but upon a larger scheme founded upon selection or exclusion of risks upon insurance principles. Like California, Utah insures many unemployment risks, but not all such risks. Excluded, in addition to near-term pregnancies, are students, pensioners, the voluntarily unemployed, those unemployed by their own misconduct, those unemployed for domestic reasons, fraud feasors, strikers, etc. Obviously these are neither all employable nor all unemployable and no categorical presumption is made about them in that regard one way or another.

Perhaps the analogy could be extended further, but the foregoing may be sufficient to distinguish the *Cleveland* decision and to illustrate the abundance of rational support for the legislative determination as to the coverage of the Utah unemployment insurance program.

What this Court said in the conclusion of the *Geduldig* case is applicable to the present case:

> "The State has a legitimate interest in maintaining the self supporting nature of its insurance program. Similarly, it has an interest in distributing available resources in such a way as to keep benefit payments at an adequate level . . . These policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class . . . There is no risk from which men are protected and women are not. Likewise

> there is no risk from which women are protected and men are not." 417 U.S. 484, 496-497.

IV. THE UTAH LAW ACCORDS WITH THE SUPREMACY OF FEDERAL LAW SINCE CONFORMITY TO FEDERAL LAW IS THE BASIS FOR ENACTMENT OF THE STATE PORTION OF THE JOINT FEDERAL-STATE UNEMPLOYMENT INSURANCE SYSTEM, AND CONTINUED CONFORMITY IS CERTIFIED UNDER STANDARDS PRESCRIBED BY CONGRESS.

It is true, as petitioners observe, that there are numerous communications such as Unemployment Insurance Program Letters within the Federal-State unemployment insurance system suggesting the consideration of various improvements in program design or content. Such letters number more than 1300 to date. These pertain to numerous subjects, few of which are mandatory upon the states. The few in the latter group, unlike the letter cited by petitioners, are clearly denominated to the states as required for conformity and the Federal statutory basis of such requirement is set forth together with required effective dates. Such mandatory instructions usually also include sample or model statutory language to be considered by State legislatures.

Congress has left no open question as to the applicable standards of conformity required of State laws in the cooperative unemployment insurance system for certification of such laws by the Secretary of Labor and

for the qualification of State employers for an offset against Federal payroll taxes.

The Federal conformity requirements for State unemployment insurance laws are contained in 26 U.S.C. § 3304 and 42 U.S.C. § 503. The former provides that the Secretary of Labor shall approve any State law which he finds meets the specified standards. Thirteen standards are prescribed, eleven of which pertain to the payment or denial of unemployment benefits. Summarizing, these require that benefits under the State law (1) be paid through approved State agencies only, (2) be withheld for the first two years after the initiation of the employer tax system, (3) be not denied for refusing certain described new work, (4) be paid or denied workers in higher education under specified conditions, (5) be conditioned at the end of a benefit year upon new qualifying work, (6) not be denied to a claimant in training with State approval, (7) not be denied or reduced by a State because the filing is in another state, (8) be proved upon combined wages between or among States, (9) not be denied by total cancellation of wage credits except upon specified grounds, (10) be payable on an extended basis in accord with the Federal-State Extended Unemployment Compensation Act of 1970, and (11) be payable to local government workers of electing units on the same basis as to other workers.

In addition to the foregoing, 42 U.S.C. § 503 (a) contains Congressional standards limiting the Secretary of Labor against certifying (for Federal funding) the otherwise approved law of any State unless ten additional requirements are met, three of which pertain to

the payment of unemployment benefits. The three are (1) that benefits be administered under merit personnel standards reasonably calculated to insure full payment of benefits when due, (2) that benefits be paid solely through the approved State agency, and (3) that benefit eligibility be adjudicated upon fair hearing procedures.

The provisions of 42 U.S.C. 503 (b) establish the procedures for notice to the State and opportunity for hearing in the event of a challenge by the Secretary as to the conformity of a State law to Federal requirements. Such hearing is made a prerequisite to a finding of non-conformity.

Conformity issues not initially raised by the Secretary may, of course, arise in the course of litigation in the courts. Since Congress has spoken definitively as to the requirements for conformity, these issues would necessarily be in cases where the Secretary is enlightened by the Court as to a meaning of the Congressional requirements not theretofore recognized by the Secretary. Such a case was *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1970) in which this Court held that the established Congressional requirement in 42 U.S.C. § 503 (a) for State payment of benefits "when due" precluded the interruption of an individual's on-going benefits by a challenge to eligibility unless prior to such interruption the claimant is afforded an opportunity to confront the issues and be heard.

The foregoing observations serve to illustrate the cooperative nature of the Federal-State relationship which is in the Employment Security system. Such co-

operation underlines the essential nature of the principle recognized by this Court in the case of *Jos. E. Seagram and sons, Inc. v. Hotstetter*, 384 U.S. 35, reh. den. 384 U.S. 967 (1966), "In this as in other areas of coincident federal and state regulation the 'teachings of this Court's decisions . . . enjoin(s) seeking out conflicts between state and federal regulation where none clearly exists.'" 384 U.S. 35, 45, citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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